Tentative Rulings for May 5, 2016
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

13CECG03245 ***James Menefield v. Matthew Cate*** **(Dept. 402)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

14CECG02461 ***Anderson v. Western Health Resources*** **is continued to Tuesday, May 10, 2016, at 3:30 p.m. in Dept. 403.**

12CECG03718 ***Davis v. Fresno Unified School District*** **is continued to Wednesday, May 11, 2016 at 3:30p.m. in Dept. 502.**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

Tentative Rulings for Department 403

(5)

Tentative Ruling

Re: ***In Re: 1666 Hampton Way, Clovis CA***
Superior Court Case No. 16 CECG 00912

Hearing Date: May 5, 2016 (Dept. 403)

Petition: Distribution of Surplus Proceeds of Trustee's Sale

Tentative Ruling:

To continue the hearing to **Thursday, June 7, 2016 at 3:30 p.m. in Dept. 403.** Any claims regarding the surplus proceeds from the Trustee's Sale in the amount of $46,334.96 currently held by the Court are to be filed with the Court no later than Monday, May 23, 2016. All claims must be filed under penalty of perjury of the laws of the State of California.

The Clerk is to serve a copy of this ruling on each the following:

Rachelle Jauregui, 1486 Ashlan Avenue, Clovis, CA 93611

Shelbie Jauregui, 1486 Ashlan Avenue, Clovis, CA 93611

Marsela Lopez, C/O Barbara Ansiel, 1486 Ashlan Avenue 93611

Anthony Lopez, C/O Barbara Ansiel, 1486 Ashlan Avenue 93611

Barbara Ansiel, 1486 Ashlan Avenue 93611

CitiMortgage, Inc., 5280 Corporate Drive, Dept.1006 Exception Processing, Frederick, MD 21703

Ascension Point Recovery Services, LLC, 200 Coon Rapids Blvd., Suite 210, Coon Rapids, MN 55433-5876

Explanation:

Proceeds from the trustee's foreclosure sale are applied (i) first, to pay the trustee's fees and expenses in exercising the power of sale and conducting the sale; (ii) next, to satisfy the debt to the beneficiary (lender); (iii) next, to the payment of junior creditors in the order of their priority; and (iv) the balance, if any, to the trustor (or its successor in interest). [Civil Code § 2924k(a); *Caito v. United Calif. Bank* (1978) 20 Cal.3d 694, 701; and *South Bay Bldg. Enterprises, Inc. v. Riviera Lend-Lease, Inc.* (1999) 72

Cal.App.4th 1111, 1118, fn. 6] When proceeds remain after the beneficiary's debt is satisfied and all of the trustee's fees and expenses have been paid, unless an interpleader action has been filed within 30 days of execution of the deed after the foreclosure sale, the trustee is required to send written notice to those persons with recorded interests in the property who would have been entitled to receive a copy of the "notice of default" pursuant to Civil Code § 2924b(b) & (c). [Civil Code § 2924j(a)] see also *Banc of America Leasing & Capital, LLC v. 3 Arch Trustee Services, Inc.* (2009) 180 Cal.App.4th 1090, 1102-1106—trustee has no duty to search for judgment lien holders who fail to request special notice. The notice must inform each such person that there has been a trustee's sale; he or she may have a claim to all or a portion of the remaining proceeds; he or she may contact the trustee to pursue any possible claim; and before the trustee may act on any such claim, he or she must provide the trustee with certain written information regarding the claim. [See Civil Code § 2924j(a) and *Banc of America Leasing & Capital, LLC v. 3 Arch Trustee Services, Inc.*, supra]

The trustee must exercise "due diligence" in determining the priority of written claims received from those persons to whom the above notice was sent. If there is no dispute as to the priority of written claims to the surplus proceeds, the trustee shall pay the proceeds within 30 days after conclusion of the above notice period. But if the trustee has failed to determine the priority of the claims within 90 days following the 30-day notice period, within 10 days thereafter the trustee must either deposit the funds with the court clerk or file an interpleader action. [Civil Code § 2924j(b); see also *Banc of America Leasing & Capital, LLC v. 3 Arch Trustee Services, Inc.*, supra]

Case At Bench

On March 22, 2016, Quality Loan Service Corp. filed a Petition and Declaration regarding unresolved claims and deposit of undistributed surplus proceeds of Trustee's Sale. It concerned the proceeds from the Trustee's Sale of real property located at 1666 Hampton Way, Clovis, CA. The trustor was Karen Ansiel. She passed away on July 14, 2014. She leaves behind 4 children, two of whom are minors.

On September 21, 2015, a trustee's sale was held. The property was purchased by a third party for $144,500. After the required distributions set forth in Civil Code § 2924(k), there remained a surplus in the amount of $46,334.96. Counsel for Petitioner located a Home Equity Line of Credit secured by a Deed of Trust on the property in favor of Citibank. See Exhibit B attached to the Petition.

But, on December 1, 2015, the Petitioner received a letter from the decedent's mother, Barbara Ansiel. She indicates that the amount claimed by Citibank is incorrect and that the surplus proceeds should go to the children of the deceased. See Exhibit C attached to the Petition. In light of the conflicting claims, counsel for the Trustee filed the above referenced Petition. The Petition was granted on March 30, 2016 and the Trustee was discharged of further responsibility for the funds. The surplus funds was deposited with the Court the same day.

A hearing was set for April 21, 2016. However, the hearing was later continued to May 5, 2016. In light of the continuance and due to the Court's concern that the

claimants did not receive proper notice of the continuance, the hearing will be continued as stated supra.

Pursuant to California Rules of Court, Rule 391(a) and Code of Civil Procedure § 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 05/04/16 .
(Judge's initials) (Date)

Tentative Rulings for Department 501

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Tentative Ruling

Re: ***Switzer v. Flournoy Management, LLC***
Case No. 11CECG04395

Hearing Date: May 5, 2016 (Dept. 501)

Motion: Cross-Complainant Switzer's Four Motions to Compel Further Responses to Discovery Requests, and for Monetary Sanctions

Tentative Ruling:

To grant Switzer's motion to compel further responses to Form Interrogatories, set one, no. 14.1 (denied as to nos. 15.1 and 17.1); Special Interrogatories, set one, nos. 1-22; Special Interrogatories, set two, no. 25; and Requests for Admission, set one, nos. 1, 2, 7, 16. (Code Civ. Proc. §§ 2030.300, 2033.290.) McCormick, Barstow, Sheppard, Wayte & Carruth, LLP, Gordon Park, Dana Denno, and Irene Fitzgerald (collectively referred to as "McCormick") shall serve further verified responses without objections within 10 days of the date of service of this order.

No sanctions are awarded.

Explanation:

Motion to Compel Form Interrogatories, Set One: Switzer moves to compel further responses to form interrogatories nos. 14.1 and 15.1. The motion is untimely as to no 15.1. A motion to compel must be filed within 45 days of service of the response. (Code Civ. Proc. § 2030.300(c).) The response at issue was served on November 6, 2015. A pretrial discovery conference request was filed on December 14, 2015, but it only discussed nos. 14.1. Since the request omitted 15.1, it did not toll the time to bring a motion to compel.

Regarding no. 14.1, McCormick objected that the term "incident" is vague and ambiguous. While "incident" is not the best description of the events in question, in light of the allegations of the cross-complaint it is apparent that the discovery concerns the alleged concurrent representation by McCormick of Flournoy and Wood. Therefore, the objection based on vagueness and ambiguity is without merit and should be overruled.

The substance of the response is evasive. Each answer in the response must be "as complete and straightforward as the information reasonably available to the responding party permits. If an interrogatory cannot be answered completely, it shall be answered to the extent possible." (Code Civ. Proc. § 2030.220(a), (b) (emphasis added).) False or evasive answers improper: "Parties must state the truth, the whole

truth, and nothing but the truth in answering written interrogatories." (*Scheiding v. Dinwiddie Const. Co.* (1999) 69 Cal.App.4th 64, 76.)

Responding parties state that they are unaware of any statutory and regulatory violations not presently set forth in the pleadings asserted against the propounding party. This is a contention interrogatory. If McCormick contends that anyone violated any statute, ordinance, or regulation, then it must identify the person and the statute, ordinance or regulation violated. A vague reference to other pleadings is not sufficient.

McCormick's opposition says that Switzer is well aware of his own pleadings and the causes of action contained in those pleadings. But the interrogatory doesn't ask about Switzer's contentions. It asks about McCormick's contention. And McCormick's response doesn't even reference Switzer's pleadings – it references the pleadings asserted against the propounding party, Switzer.

Motion to Compel Requests for Admissions ("RFA"): The requests at issue are nos. 1, 2, 7 and 16, and the corresponding form interrogatory 17.1.

RFA no. 1 reads: "Admit that YOU accepted the concurrent representation of Flournoy Management, LLC and Robert 'Sonny' Wood in Fresno County Superior Court Case No. 11 CE CG 04395 JH no later than April 2, 2012."

No. 2 reads: "Admit that YOUR concurrent representation of Flournoy Management, LLC and Robert 'Sonny' Wood in Fresno County Superior Court Case No. 11 CE CG 04395 JH continued from no later than April 2, 2012 through at least October 23, 2013."

Subject to the objections that the phrases "concurrent representation" and "no later than" are vague and ambiguous, McCormick Barstow admitted both requests. Subject to the same objections, the individual attorney cross-defendants "admit[ted] to having been one of the attorneys assisting McCormick in its representation."

Despite the unequivocal admission by McCormick Barstow, a further response without the objection should be served. It is not proper to object that the request is "ambiguous," unless it is so ambiguous that the responding party cannot in good faith frame an intelligent reply. (*Cembrook v. Superior Court* (1961) 56 Cal.2d 423, 42.) The phrases objected to, particularly in the context of this litigation and the claims against McCormick, clearly are not vague or ambiguous.

All McCormick cross-defendants must serve supplemental responses omitting these objections, which are overruled.

Additionally, the individual defendants' substantive response is deficient. The response must contain either an answer or an objection to the particular RFA. (Code Civ. Proc. § 2033.210(b).) Each answer "shall be as complete and straightforward as the information reasonably available to the responding party permits." (Code Civ. Proc. § 2033.220(a).) It is unclear to what extent the individual cross-defendants are

denying the request, or what portions or aspects of it they deny, if they deny anything at all.

RFA no. 7 reads: "Admit that the remuneration paid to YOU for the representation of Flournoy Management, LLC in Fresno County Superior Court Case No. 11 CE CG 04395 JH, from the time YOU undertook the concurrent representation of Flournoy Management, LLC and Robert 'Sonny' Wood in Fresno County Superior Court Case No. 11 CE CG 04395 JH through at least October 2012, was paid to YOU by Access Medical, LLC, not by Flournoy Management, LLC."

McCormick asserted numerous meritless objections. They objected that the terms "remuneration" and "concurrent representation" are vague and ambiguous. They also objected that the request is compound. These objections are overruled. They also objected that the request assumes facts and lacks foundation. This is a patently improper objection. Switzer's response to these objections is accurate:

> The objection that a discovery request assumes a fact not in evidence does not apply to written discovery to which instantaneous responses are not required, thus giving the responding party the opportunity to frame a response which avoids the pitfalls that could not be avoided if the response were being provided live during trial. (*West Pico Furniture Co. of Los Angeles v. Superior Court* (1961) 56 Cal.2d 407, 421; *Cembrook v. Superior Court* (1961) 56 Cal.2d 423, 429 — approving application to requests for admissions of West Pico 's holdings concerning objections to interrogatories.) The only "foundation" required for the request is that is be within the permissible scope of discovery. (Code of Civil Procedure §2033.010)

McCormick also objected initially that the request seeks information protected by the attorney-client privilege and attorney work product doctrine.

It is not apparent how the attorney-client privilege or work product doctrine would apply. As the party asserting the objection, McCormick must establish the preliminary facts required for application of the privilege. (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733.) The request asks McCormick to admit that a non-client was paying Flournoy's legal expenses. Moreover, the party opposing a motion to compel has the burden of justifying any objection. (*Coy v. Superior Court* (1962) 58 Cal.2d 210, 220-221 [interrogatories].) The opposition makes no attempt to justify these objections. All objections are overruled.

The substantive portion of the responses are sufficient. However, because the responses were provided subject to the meritless objections, McCormick should be ordered to provide a response omitting the objections.

RFA no. 16 reads: "Admit that no amount of the remuneration paid to YOU for the representation of Flournoy Management, LLC in Fresno County Superior Court Case No. 11 CE CG 04395 JH was paid to YOU by Flournoy Management, LLC."

The objections were the same as to no. 7, and should be overruled for the same reasons.

Substantively, McCormick admitted the request subject to the objections. They should be ordered to provide further responses omitting the overruled objections.

Included in this motion is a request that the court order McCormick to provide further response to form interrogatory no. 17.1, which asks for information supporting each response to a request for admission that was not an unqualified admission. The motion is untimely as to this form interrogatory. The last response to form interrogatory 17.1 was served on July 21, 2015. (Altounian Dec. ¶ 4, Exh. 1.) No supplemental response was served along with the other discovery. The 45 days has long passed.

Motion to Compel Special Interrogatories, Set One: Switzer moves to compel further responses to Special Interrogatories, set one, nos. 1-22.

In response to nos. 8, 10, 11, 13, 14, 16, 17, 19, 22, McCormick provided a response "subject to the objection previously lodged." However, no objections were lodged in McCormick's initial responses to these interrogatories. It is unclear if information was withheld on the basis of objections that were never asserted. Accordingly, the response is vague and ambiguous and should be amended (without objections).

The remainder of the interrogatory responses did actually assert objections. Switzer does not take issue with the substantive portion of the responses to where provided. The court will therefore consider them sufficient, so far as the substantive portion of the objections go. The objections include vague and ambiguous, assumes facts, lacks foundation, and compound. These objection lack merit and are overruled.

McCormick also object on grounds of attorney-client privilege and work product doctrine. If a timely motion to compel has been filed, the burden is on the responding party to justify any objection or failure fully to answer the interrogatories. (*Coy v. Superior Court* (1962) 58 Cal.2d 210, 220-221.) McCormick offers no justification for any of the objections as to any of the interrogatories in the opposition. The opposition does not address the substance of the motion as to any interrogatory or objection. Other than pointing out that the client holds the privilege, and McCormick cannot waive it (Oppo. p. 4), McCormick makes no argument justifying the privilege or work product objections as to any of the interrogatories.

Moreover, McCormick gave no substantive response to interrogatory nos. 3 and 6. Each answer in the response must be "as complete and straightforward as the information reasonably available to the responding party permits. If an interrogatory cannot be answered completely, it shall be answered to the extent possible." (Code Civ. Proc. § 2030.220(a), (b).) McCormick made no effort to provide a response that includes even unprivileged information.

In their response to interrogatory no. 16, McCormick answered an interrogatory that is not what was propounded on them. If it was just a clerical error, McCormick

should have served an amended response quoting the correct interrogatory, so the propounding party could be sure McCormick was answering the interrogatory posed to it. It should be ordered to do so now.

Motion to Compel Special Interrogatories, Set Two: Switzer moves to compel a further response to Special Interrogatory, set two, number 25.

Interrogatory nos. 3 and 9 asked McCormick to state all facts upon which they base their contention that their concurrent representation of Flournoy and Wood without Flournoy's informed consent "was at no time" a breach of fiduciary duty owed to Flournoy or a violation of Rule 3-310(c)(2) of the Rules of Professional Conduct. McCormick responded that "[t]he interests of the managing member of Flournoy LLC and Flournoy LLC were not in conflict."

Switzer followed up with interrogatory no. 25, which calls upon McCormick to state all facts upon which they base their contention that there was never an actual conflict between the interests of Flournoy and Wood at any time before December 18, 2013. McCormick simply responded, "That is not and was not Responding Parties contention."

A motion to compel lies where the party to whom the interrogatories were directed gave responses deemed improper by the propounding party; e.g., objections, or evasive or incomplete answers. (Code Civ. Proc. § 2030.300.)

Each answer in the response must be "as complete and straightforward as the information reasonably available to the responding party permits. If an interrogatory cannot be answered completely, it shall be answered to the extent possible." (Code Civ. Proc. § 2030.220(a), (b).) False or evasive answers improper: "Parties must state the truth, the whole truth, and nothing but the truth in answering written interrogatories." (*Scheiding v. Dinwiddie Const. Co.* (1999) 69 Cal.App.4th 64, 76.)

On the one hand, the earlier responses claimed that there was no conflict between Wood and Flournoy. Then McCormick deny that it is their contention that there was never an actual conflict between the interests of Flournoy and Wood at any time before12/18/13. The answer to interrogatory no. 25 is evasive and clearly inconsistent with the responses to interrogatory nos. 3 and 9, and is therefore false. McCormick should be ordered to serve a supplemental response.

Pursuant to Cal. Rules of Court, Rule 3.1312 and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 05/04/16 .
(Judge's initials) (Date)

(17) **Tentative Ruling**

Re: ***Crop Production Services, Inc. v. EarthRenew, Inc.***
Court Case No. 09 CECG 02733

Hearing Date: May 5, 2016 (Dept. 501)

Motion: CPS' Motion to Compel Further Responses to Requests for Production of Documents and Production of Further Amended Privilege Log

Tentative Ruling:

To grant the motion in part and find the attorney-client privilege vitiated as to any document where the attorney-client privilege was premised solely on Gene Dillahunty's status as an attorney. To require further amendment of EarthRenew's Amended Privilege Log with respect to Entry No. 76.

Explanation:

Authority for Motion:

A party responding to a request for production may object to any item or category demanded in whole or in part. To be effective, the objection must: identify with particularity the specific document or evidence demanded as to which the objection is made; and set forth the specific ground for objection, including claims of privilege or work product protection. (Code Civ. Proc., § 2031.240, subd. (b).) When asserting claims of privilege or attorney work product protection, the objecting party must provide "sufficient factual information" to enable other parties to evaluate the merits of the claim, "including, if necessary, a privilege log." (Code Civ. Proc., § 2031.240, subd. (c)(1).) A privilege log is either required at the time the response is made (see Code Civ. Proc., § 2031.240(c)(1) or in response to a motion to compel (*Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110,130).

Where a demanding party is unsatisfied with a party's response to a demand for production, the remedy is to bring a motion to compel a further response. (Code Civ. Proc. § 2031.310.) In particular, such a motion can be used to attack a response containing objections. (Code Civ. Proc. § 2031.310, subd. (a).)

The Attorney–Client Privilege:

California's attorney-client privilege is embodied in Evidence Code section 950 et seq. and protects confidential communications between a client and his or her attorney made in the course of an attorney-client relationship. (*Palmer v. Superior Court* (2014) 231 Cal.App.4th 1214, 1224.) Evidence Code section 954 "confers a privilege on the client 'to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer....' " (*Costco Wholesale Corp.*

v. *Superior Court* (2009) 47 Cal.4th 725, 732 (*Costco*).) "The party claiming the privilege has the burden of establishing the preliminary facts necessary to support its exercise, i.e., a communication made in the course of an attorney-client relationship. [Citations.]" (*Id*. at p. 733.)

Evidence Code section 951 defines "client," for purposes of the privilege, as "a person who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity...." (Evid. Code, § 951.) "[I]t is settled that a corporate client ... can claim the privilege." (*Costco*, *supra*, 47 Cal.4th at p. 733; *D.I. Chadbourne, Inc. v. Superior Court* (1964) 60 Cal.2d 723, 732, 736.) Evidence Code section 950 defines "lawyer" as "a person authorized, or *reasonably believed* by the client to be authorized, to practice law in any state or nation." (Evid. Code, § 950 (emphasis added).)

Privilege with Respect to Gene Dillahunty:

It is undisputed that Dillahunty let his license to practice law lapse, and by 2005 was not licensed to practice law in any jurisdiction. Moreover, Dillahunty testified in his deposition that by 2005 he was not practicing law at EarthRenew. Nevertheless, EarthRenew argues that it reasonably believed Dillahunty was an attorney based on the deposition testimony and declaration of Christianne Carin, CEO of EarthRenew. Carin thought Dillahunty was an attorney licensed to practice law in California at the time he was employed by EarthRenew and claims that he provided "legal advice and services regarding intellectual property issues and related agreements" and "legal advice and services relating to this litigation."

First, EarthRenew is a corporation, and the knowledge of a corporation cannot be tested by the knowledge of only one person. The knowledge of all EarthRenew's officers and directors will be imputed to EarthRenew. A corporation can acquire knowledge only through its officers and agents. The knowledge of a corporate officer within the scope of his employment is the knowledge of the corporation. (*Meyer v. Glenmoor Homes, Inc*. (1966) 246 Cal.App.2d 242, 264; *Uecker v. Zentil* (2016) 244 Cal.App.4th 789, 797.) Accordingly, the knowledge possessed by Dillahunty himself as an Executive Vice President of EarthRenew, concerning his licensure status will be imputed to EarthRenew.

Thus, EarthRenew cannot be said to have *reasonably believed* that Dillahunty was authorized to practice law in any state or nation and there is no attorney-client privilege with Dillahunty. Therefore, any documents which were withheld solely due to Dillahunty's status as an attorney must be produced.

Privilege with Respect to Dustin Gemmill:

Attorney-Client Relationship:

It is undisputed that Gemmill has been at all relevant times, an attorney dully licensed to practice in the nation of Canada. Unlike Dillahunty, he is an "attorney."

Nevertheless, CPS claims that EarthRenew cannot establish the existence of an attorney-client relationship with Gemmill because he operated in a business capacity with respect to the transaction at issue. Again, the party claiming the privilege has the burden of establishing the preliminary facts to support a privilege, i.e., "a communication made *in the course of an attorney-client relationship*." (*Costco*, *supra*, 47 Cal.4th at p. 733 (emphasis added).) Once that party establishes facts necessary to support a prima facie claim of privilege, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish the communication was not confidential or that the privilege does not for other reasons apply. [Citations.] (*Ibid*.) Also, a client is defined in the Evidence Code as one consulting a lawyer for "securing legal service or advice from him *in his professional capacity*." (Evid. Code, § 951 (emphasis added).) Finally, it is well established that "a communication does not fall within the attorney-client privilege unless the dominant purpose of the communication is a furtherance of the attorney-client relationship. [Citation.]" (*Montebello Rose Co. v. Agricultural Labor Relations Bd*. (1981) 119 Cal.App.3d 1, 31.) "The privilege does not apply to communications to an attorney who is transacting business that might have been transacted by another agent who is not an attorney. [Citation.]" (*Id*. at p. 32.) Thus, "the attorney-client privilege does not attach to an attorney's communications when the client's dominant purpose in retaining the attorney was something other than to provide the client with a legal opinion or legal advice. [Citations.] For example, the privilege is not applicable when the attorney acts merely as a negotiator for the client or is providing business advice [citation]; in that case, the relationship between the parties to the communication is not one of attorney-client." (*Costco*, *supra*, 47 Cal.4th at p. 735.)

Accordingly, the California Supreme Court in *Costco*, *supra*, 47 Cal.4th 725, held that the trial court first determines the dominant purpose *of the relationship* between a corporation its in-house attorneys, if the trial court determines it is one of attorney-client, then the corporation then has the burden of establishing the preliminary fact that the subject communications were made during the course of an attorney-client relationship. (*Costco*, *supra*, 47 Cal.4th at pp. 739-740.)

CPS claims that Gemmill actively and repeatedly met with Mr. Duckworth and Mr. Mullins and was a point person for negotiations about substantive contract terms without ever communicating with any inside CPS lawyers or CPS' outside counsel. Moreover, EarthRenew voluntarily produced "dozens" of documents from the time period during which the offtake agreement was being negotiated as non-privileged which involve the same people and same subject matter. These facts do not clearly establish that the dominant purpose of the relationship between EarthRenew and Gemmill was one of negotiator and client, or anything but attorney and client. During the time Gemmill held the title of "Director, Legal" and "Vice President, Legal" at EarthRenew, he acted as in-house counsel to EarthRenew. (Gemmill Decl. at ¶¶ 1, 2.) In that capacity he "provided legal advice and serviced to the company on a wide range of matters …" (Gemmill Decl. ¶ 2.)

EarthRenew has carried its burden of making a prima facie showing that the subject communications were made during the course of an attorney-client relationship with Gemmill.

Waiver – State of Mind:

"[T]he person or entity seeking to discover privileged information can show waiver by demonstrating that the client has put the otherwise privileged communication directly at issue and that disclosure is essential for a fair adjudication of the action. [Citation.]" (*Southern Cal. Gas Co. v. Public Utilities Com.* (1990) 50 Cal.3d 31, 40.) CPS contends that EarthRenew, by suing CPS for breach of contract, placed Mullin's actual and/or ostensible authority to bind CPS to the Offtake Agreement at issue, and thus, it waived the attorney-client privilege as to the documents integral to that subject. CPS relies on *Chicago Title Ins. Co. v. Superior Court* (1985) 174 Cal.App.3d 1142 (*Chicago Title*).

In *Chicago Title*, plaintiff Chicago Title brought an action for fraud alleging the defendant bank knew of a "check kiting" scheme, did nothing to stop it, and in fact assisted the fraud. (*Chicago Title*, *supra*, 174 Cal.App.3d at pp. 1145–1147.) The defendant, on the other hand, claimed that Chicago Title not only knew of the fraudulent scheme, but itself was a willing participant. The defendant sought discovery from Chicago Title's in-house counsel, who was responsible for monitoring checks coming into and out of the accounts in question, regarding conversations he had with other Chicago Title employees. On a motion to compel the trial court found that the attorney-client privilege had been waived because the questions concerned the state of Chicago Title's knowledge of the fraud. (*Id*. at pp. 1147–1148, 1151.)

The court of appeal agreed, initially observing, "[T]he privilege may impliedly be waived. [Citations.] Such an implied waiver occurs where the plaintiff has placed in issue a communication which goes to the heart of the claim in controversy." (*Chicago Title*, *supra*, 174 Cal.App.3d at p. 1149, fn. omitted.) The court concluded: "[T]he protection of the privilege must be denied to [the in-house counsel] in his role of corporate counsel for two reasons. First, [the counsel's] actions as ... legal counsel were so intertwined with activities which were wholly business or commercial that a clean distinction between the two roles became impossible to make. This merging of business and legal activities jeopardizes the assertion of the attorney-client privilege, *since the attorney and the client in effect have become indistinguishable*. The second reason, which in part results from the first, is that [the counsel's] dual role as both business agent and attorney provided him with the most comprehensive awareness of the [disputed] relationship, both prior to and during the alleged fraud.... *Clearly [the attorney], in his dual role of business agent and attorney, is the person who most thoroughly can attest to the knowledge of the corporate entity*.... [¶] ... This is not to say that solely by bringing an action in fraud the attorney-client privilege disappears; nor are we asserting that the employment of in-house counsel, standing alone, erodes the privilege. We merely find that ... the facts of this case ... result[ed] in the implied waiver of the attorney-client privilege." (*Id*. at p. 1154, italics added.)

Here, unlike the in-house attorney in *Chicago Title*, Gemmill was not the party with the "most comprehensive awareness of the [disputed] relationship" nor did EarthRenew and Gemmill become indistinguishable. CPS' moving papers acknowledge that Carin and Hasinoff also directly negotiated the Offtake Agreement. In fact, Carin signed the Agreement on behalf of EarthRenew. While Gemmill made the fateful decision to substitute Mr. Mullins for Mr. Duckworth as CPS' signatory on the Offtake Agreement "on his own," this subject can also be explored at deposition.

Waiver – Partial Disclosure:

The attorney-client privilege may be lost by an express or implied waiver. Subdivision (a) of section 912 of the Evidence Code provides that "the right of any person to claim [the attorney-client privilege] is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure...." In making this argument CPS relies primarily on *Jones v. Superior Court* (1981) 119 Cal.App.3d 534. *Jones* defined "communication broadly: "the term 'communication' deserves, in this context, a liberal construction. A patient, for example, who has disclosed her conversation with a physician on Monday ought not be permitted to claim the privilege with respect to a conversation with the same physician and relating to the same subject matter on Tuesday." (*Id*. at p. 547.)

CPS also relies on the non-published federal case *Garcia v. Progressive Choice Ins. Co*. (S.D. Cal., Sept. 27, 2012) 2012 WL 4490755 which upheld a discovery order compelling production of attorney-client privileged emails between a corporate defendant's employees and its attorney con the grounds that defendant had waived the privilege by previously producing other privileged documents "contemporaneous with the disclosed items, [that] involve the same claim, and are between the same individuals." Additionally, the discovery order found that because the defendant voluntarily disclosed a large amount of communications it had with the attorney regarding the subject claim, the purpose of the privilege was lost.

Common to these cases is the fact that actual privileged information was disclosed causing the courts to order disclosure of the remainder of the privileged information. CPS has been unable to show that EarthRenew has disclosed *any* privileged information. CPS' three examples, the April 22, 2009 email, the May 11, 2009 email and the July 21, 2009 email, do not contain any privileged information. The April 22, 2009 email contains statements by Carin that Gemmill will be sending a draft of the Offering Memorandum and EarthRenew's bank states it has been speaking with Gemmill about the Offering Memorandum, but there appears to be no substantive disclosures about the conversations with Gemmill. The May 11, 2009 email is by Hasinoff to several EarthRenew employees, including Gemmill, in which Hasinoff explains the content of conversations with CPS employees, that Mullins was responsible for the contracts and that EarthRenew had to keep pushing Mullins to make sure the agreements were completed. I have read the entire email. Nothing in the email pertains to Gemmill's role as an attorney, only as a business consultant. With respect to

the July 21, 2009 email, it is from Hasinoff to EarthRenew employee Mila Manasek, and only cc'ed to Gemmill. It tells Manasek to make sure that another person has the correct wire transfer information. Copying Gemmill with internal instructions to an employee regarding sorting out a wire transfer is not a privileged communication. (*San Francisco Unified School Dist. v. Superior Court for City and County of San Francisco* (1961) 55 Cal.2d 451, 457 ["the forwarding to counsel of non-privileged records, in the guise of reports, will not create a privilege with respect to such records and their contents where none existed theretofore."].)

No Partial Disclosure:

CPS argues that Gemmill's percipient knowledge, observations, and beliefs are not privileged or work product. They are not. (*State Farm Fire & Cas. Co. v. Superior Court* (1997) 54 Cal.App.4th 625, 639.) However, the fact that a document rendered non-discoverable by the attorney-client privilege may contain some non-privileged material does not make any part of it discoverable. (*Costco*, *supra*, 47 Cal.4th at p. 731.) CPS can only use other methods of discovery, including depositions, to obtain Gemmill's percipient knowledge, observations and beliefs.

Request for Amended Privilege Log:

In its Notice of Motion CPS asks that EarthRenew amend its Amended Privilege Log with respect to Entry Nos. 76 and 82. However, in its Separate Statement in support of its Motion to Compel CPS seeks additional information with respect to Entry Nos. 3-9, 12-13, 15-17, 19, 29-20, 44, 50-56, 64, 67, 70-71, 76, 81-231, 130, 133-140, 144-154 and 159. Because only Entry Nos. 76 and 82 were disclosed in the Notice of Motion, the motion must be limited to those entries.

Entry No. 76 was actually produced with references to legal counsel's advice redacted. (Marroso Decl. Ex. 9.) EarthRenew apparently cannot determine which specific EarthRenew employees received this document and claims it cannot fill in the "recipient" box in the Amended Privilege Log. EarthRenew can file a further Amended Privilege Log with that information: "EarthRenew employees – specific identities unascertainable." EarthRenew has a similar problem with Entry No. 82; it was prepared by an attorney, but EarthRenew cannot determine exactly which attorney prepared it. In this case, EarthRenew's designation of "Legal" with an explanation that the author was, in fact, and attorney employed or retained by EarthRenew is sufficient.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 05/04/16 .
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***Koosharem, LLC v. Alexander***
Superior Court Case No.: 15CECG01543

Hearing Date: May 5, 2016 (**Dept. 501**)

Motions: By Intervenors D. Stephen Sorensen and The Sorensen Trust and SST Holdings, LLC, for relief from stay and motion for judgment on the pleadings and release of interplead funds

Tentative Ruling:

To deny.

Explanation:

On September 14, 2015, this Court granted a stay because it appeared to the Court "that the issues in this may well be addressed in the pending federal action in the Central District of California, which is set for trial on March 22, 2016. A stay of this state action for a reasonable period of time would appear to be warranted, as it may reduce or eliminate the need for the state action depending on what occurs in the federal case." (September 14, 2015, order after hearing.)

Moving parties have made no showing that the need for the stay no longer exists.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 05/04/16 .
(Judge's initials) (Date)

Tentative Rulings for Department 502

(20) **Tentative Ruling**

Re: ***Hamby v. Hovsepian et al.***, Superior Court Case No. 14CECG01784

Hearing Date: **May 5, 2016 (Dept. 502)**

Motion: Motion for Leave to File Cross-Complaint

Tentative Ruling:

To deny.

Explanation:

As to plaintiff, Hamby, the cross-complaint is compulsory. Since the proposed new party, Roger Vehrs, is not currently a party to the action, it does not appear that the cross-complaint is compulsory as to him.

Even if the cross- complaint is compulsory, leave to amend may be denied if the moving party did not act in good faith. (Code Civ. Proc. § 426.50.) The court finds that Hovsepian has not shown that he has acted in good faith. The sole explanation for the delay in seeking leave to amend is that plaintiff denied knowing about the alleged oral contract alleged in the cross-complaint during her deposition on April 8, 2016. The court fails to see the relevance of plaintiff's denial of knowing about the agreement. This has no impact on the existence of the cause of action, or on Hovsepian's knowledge of the existence of the facts giving rise to the cause of action. Moreover, since the focus is on Hovsepian's knowledge of the facts giving rise to the claim, the fact that his current counsel is relatively new to the case is of no moment.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 05/03/16 .
(Judge's initials) (Date)

Tentative Rulings for Department 503

03

Tentative Ruling

Re: ***Avila v. Walker***
Case No. 15 CE CG 01940

Hearing Date: May 5th, 2016 (Dept. 503)

Motion: Defendant David Marin's Demurrer to First Amended Complaint

Tentative Ruling:

To overrule the demurrer to the first amended complaint. (Code Civ. Proc. § 430.10.) To order defendant to file his answer to the first amended complaint within 10 days of the date of service of this order.

Explanation:

First of all, plaintiff objects that the demurrer is untimely, since it was not filed within 30 days of the date of service of the complaint. (Code Civ. Proc. § 430.40, subd. (a).) Indeed, it does appear that the demurrer is untimely, since defendant was served on December 8th, 2015 by personal delivery, but he did not file his demurrer until March 14th, 2016, over three months later.

However, the failure to file the demurrer within 30 days of service of the complaint does not necessarily bar defendant from demurring to the complaint, as long as his default has not already been taken. (*Gitmed v. General Motors Corp.* (1994) 26 Cal.App.4th 824, 827-828: "'it is generally recognized that an untimely pleading is not a nullity, and it will serve to preclude the taking of default proceedings unless it is stricken.'") Here, plaintiff did not attempt to take defendant's default until April 8th, 2016, after the demurrer had already been filed, so the fact that the demurrer was untimely will not prevent the court from hearing it.

Next, with regard to the merits of the demurrer, defendant claims that plaintiff lacks legal capacity to sue under Code of Civil Procedure section 430.10, subd. (b), but defendant offers no argument or citations to the first amended complaint to support his contention. There is nothing in the first amended complaint that indicates that plaintiff does not have the legal capacity to sue, such as some mental or legal disability, or that she is a minor who cannot sue on her own behalf. Therefore, this contention is completely unsupported, and the court will disregard it.

Defendant also claims that "Since Plaintiff Does [*sic*, does not] have standing to commence action against Defendants as it fails the 'real party in interest' requirement, 'the pleading does not state facts sufficient to constitute a cause of action' on behalf

of the proper specific defendant pursuant to Code of Civil Procedure § 430.10(e)." This contention is virtually incomprehensible, but it appears that defendant may be arguing that plaintiff is not a real party in interest in the action due to her lack of capacity to sue. Again, however, defendant has not pointed to any facts in the complaint or any legal authorities that would support his claim that plaintiff lacks the capacity to sue him, and the facts in the complaint show that plaintiff is a "real party in interest" to the action, since she alleges that she was injured by defendant's negligent driving.

"Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute." (Code Civ. Proc., § 367.) "A party who is not the real party in interest lacks standing to sue. 'A real party in interest ordinarily is defined as the person possessing the right sued upon by reason of the substantive law.' A complaint filed by someone other than the real party in interest is subject to general demurrer on the ground that it fails to state a cause of action." (*Redevelopment Agency of City of San Diego v. San Diego Gas & Elec. Co*. (2003) 111 Cal.App.4th 912, 920-921, internal citations omitted.)

Here, plaintiff alleges that she suffered personal injuries when she was struck by a car negligently operated by the defendants. There is nothing indicating that anyone other than plaintiff was injured, or that plaintiff does not have the right and ability to sue on her own behalf. Therefore, plaintiff has met the "real party in interest" requirement, and defendant's demurrer on this ground has no merit.

Defendant also argues that the proof of service is defective, but then claims that a "(7) DAY NOTICE TO TERMINATE THE LICENSE AGREEMENT" "is not a PAY RENT OR QUIT." He also contends that it is "uncertain what rent defendant has failed to pay." However, this is not a case regarding failure to pay rent or for terminating a lease or license agreement. It is an auto accident case, so defendant's arguments here are nonsensical and irrelevant to the issues raised by the complaint.

Defendant also argues that the complaint is fatally flawed because it is uncertain who is the owner or agent, and there is no description of the property that is the subject of the action or its usual location. Again, this argument is irrelevant to the issues of the subject action, which concerns an auto accident and not the location of real or personal property. Defendant's argument here is completely misplaced.

Also, to the extent that defendant is arguing that the complaint is uncertain as to the ownership of the two cars involved in the accident, that uncertainty can be resolved through discovery. The complaint is not so uncertain as to be subject to a demurrer. "[D]emurrers for uncertainty are disfavored. We strictly construe such demurrers because ambiguities can reasonably be clarified under modern rules of discovery." (*Lickiss v. Financial Industry Regulatory Authority* (2012) 208 Cal.App.4th 1125, 1135, internal citations omitted.)

Next, defendant argues that the complaint is insufficiently pled because it states that all defendants were negligent in their driving of the vehicle, and it is uncertain how defendant Bavarian Imports could be in the vehicle. The complaint also confusingly states that all defendants were entrusted with the 1996 Ford Windstar. In addition,

defendant claims that it is uncertain whether Harold Walker was an agent or employee, or both, of the other defendants, and how he was acting in the course and scope of his employment at the time of the accident.

However, while the allegations of the first amended complaint are not a model of clarity, they do appear to allege that Harold Walker was the driver of the vehicle that caused the accident, and that he was acting as an agent or employee of the other defendants at the time of the accident. "Harold Walker was then and there, an agent or employee of Bavarian Imports and Marin Wholesale and was acting within the course and scope of his employment at the time of the collision, thereby proximately causing injuries and damages to Plaintiff Andrea Avila." (FAC, p. 5, ¶ GN-1.) The FAC also somewhat confusingly alleges that all defendants were negligently and carelessly driving the vehicle at the time of the accident (*ibid*), but it appears that the plaintiff is only alleging that Walker was the actual driver, and the other defendants are being sued as the employers or principals of Walker. To the extent that the complaint is somewhat vague as to who was actually driving and what the relationship is between the various defendants, this ambiguity can be cleared up through discovery. (*Khoury v. Maly's of California, Inc*. (1993) 14 Cal.App.4th 612, 616.)

Defendant also argues that the complaint was defectively served on defendant Harold Walker, since the complaint was allegedly left on his front porch when he was not at home. However, defendant Marin has no standing to challenge the service of the complaint on a different defendant. In any event, the claim of defective service is not a valid ground for a demurrer, although it might support a motion to quash service of summons by defendant Walker. At this time, no such motion has been filed by Walker, however, so Marin's attempt to raise the issue in his demurrer is misplaced and irrelevant.

Therefore, since defendant has not raised any valid grounds for demurring to the first amended complaint, the court intends to overrule the demurrer and order defendant Marin to file his answer within 10 days.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 05/04/16 .
(Judge's initials) (Date)